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No. 489

In the Supreme Court of the United States

OCTOBER TERM, 1960

MONOLITH PORTLAND MIDWEST COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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This is an action brought by petitioner against the Reconstruction Finance Corporation for damages for the termination of a contract with petitioner. After earlier proceedings, the case was, on November 18, 1957, remanded by the court of appeals for retrial before a jury. On January 19, 1959, while the case was still pending for trial, the Administrator of the General Services Administration, to whom the relevant functions of the RFC had been transferred, appeared specially and moved to dismiss the action on the ground that the RFC had been abolished on June 30, 1957, and the action had abated upon the failure of petitioner to substitute the GSA Administrator as de-

fendant within the one-year period for substitution allowed by § 105 of the RFC Liquidation Act of 1953, 67 Stat. 230, as amended by 68 Stat. 320. The district court dismissed the action and the court of appeals affirmed. The sole question presented here is whether the action abated.

As amended to June 29, 1954, the RFC Act of 1932 provided that the RFC would be "dissolved" upon the completion of a series of enumerated steps (§ 10, 15 U.S.C. 609, Pet. App. 16–17). Section 105 of the RFC Liquidation Act[1] provided that no pending action against the RFC "shall abate by reason of the dissolution of the Corporation; but the Court may, on motion * * * filed at any time within twelve months after the date of such dissolution * * * allow the same to be maintained by or against the officer or agency" to whom the relevant functions were transferred (here, the GSA Administrator) (Pet. App. 26).

By June 30, 1957, the procedure for dissolution provided for by the amended RFC Act had not yet been accomplished. On that date, however, that procedure was superseded by Reorganization Plan No. 1 of 1957 (22 F.R. 4633, 71 Stat. 647, 15 U.S.C. 601, note), which declared that the RFC "is hereby abolished" (§ 6, Pet. App. 29) and transferred its relevant functions to the GSA (§ 2(b), Pet. App. 28).

It is acknowledged by petitioner that, in the absence of some statutory provision continuing the RFC's life for purposes of litigation or providing for substitu-

[1] Other sections of that Act had amended the dissolution provisions of the RFC Act.

tion, actions against it would abate upon the termination of its existence. See *Defense Supplies Corporation* v. *Lawrence Warehouse Co.*, 336 U.S. 631, 634–636. Nor does petitioner seriously deny that, if § 105 of the Liquidation Act is the controlling provision, the action abated upon its failure to substitute the GSA Administrator before June 30, 1958.[2] Petitioner's argument is rather that (1), since § 105 referred to "dissolution", it was applicable only to "dissolution" as provided for in the amended RFC Act and not to the "abolishment" decreed by the subsequent Reorganization Plan; and (2), there being no applicable federal statute, state law (under which the action would allegedly not abate) governs.

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[2] The petition apparently does preserve, though without elaboration of the facts, a contention that the Government was "estopped" to assert abatement (Pet. 7, 15), but that claim, rejected by the district court on the merits (R. 397, 398), is plainly insubstantial. The claim is based upon correspondence between petitioner's counsel and Government representatives during 1955 and early 1956, long before the RFC was abolished. The first letter (January 1955) erroneously assumed that the RFC had been dissolved on June 30, 1954, and asked who should be substituted, in response to which petitioner was correctly informed that the RFC had not yet been dissolved and hence that no substitution was appropriate (R. 348–350). The other correspondence, the last of which was dated April 6, 1956, consisted simply of requests for, and the furnishing of, information as to the progress of the liquidation of the RFC (R. 351–357; 363–365). It is not claimed that any of the information furnished was erroneous or misleading, and the theory of estoppel on which petitioner relies is difficult to comprehend. In any event, as the court of appeals held, theories of estoppel cannot prevent abatement for failure to make a timely substitution. *Snyder* v. *Buck*, 340 U.S. 15, 19; *Poindexter* v. *Folsom*, 242 F. 2d 516 (C.A. 8).

Both contentions are unsound. The RFC was a federally-created entity all of whose functions and powers were defined by Act of Congress, and it is by federal law, not state law, that its juridical status and capacity to be sued must be determined. If no federal statute continued its existence for purposes of litigation after it was "abolished", the result would be, not resort to state law, but the *immediate* abatement of actions against it. However, as shown by the court of appeals' careful analysis of the several statutes, there is no possible reason to read the Reorganization Plan's use of the word "abolished" rather than "dissolved" as intended to make the twelve-month substitution period allowed by § 105 of the Liquidation Act inapplicable.[3] That section fully applied and provided the exclusive authority for substitution. The case is therefore controlled by this Court's decision in *Defense Supplies Corporation* v. *Lawrence Warehouse Co., supra,* holding an action against the Defense Supplies Corporation to be abated upon a failure to substitute its successor within the period allowed by a statute virtually identical in terms to § 105.

The decision is correct, there is no conflict, and to our knowledge there are no other cases pending in-

[3] As the court of appeals pointed out (Pet. App. 9–10), the Reorganization Plan, in using the term "abolished", simply followed the language of the Reorganization Act of 1949 (5 U.S.C. 133z), where the broader term was needed to encompass the elimination of executive agencies as well as the "dissolution" of government corporations.

volving questions of substitution for the RFC. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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